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Question Presented:

Whether 34 C.F.R. § 76.532(a) prohibits the government from paying for the sign language interpreter requested by the Petitioners.

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INTEREST OF *AMICI CURIAE*

The National Coalition for Public Education and Religious Liberty (National PEARL) is a national coalition of organizations sharing the objective of preserving religious freedom and separation of church and state in education.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including the separation of church and state as well as religious freedom.

People For recognizes the difficult and controversial nature of the constitutional issues that many of the parties and *amici* have sought to raise in this case, which could have major implications in many other cases as well. Particularly in light of the significance of these issues, it is important that this Court carefully take into account the prudential principles with respect to avoiding premature or unnecessary rulings on such issues. As explained *infra*, the particular dispute in this case appears to be governed by a federal regulation prohibiting the type of aid at issue even though the applicability and constitutionality of the regulation were not specifically decided by the courts below. People For accordingly has requested leave to file this *amicus* brief and suggests that the Court affirm the judgment below based on the regulation or, in the alternative, remand for reconsideration in light of the federal regulation.

The National Association of Secondary School Principals (NASSP) is a voluntary association of approximately 43,000 administrators of public and private secondary schools throughout the United States. One of its purposes is to act as a spokesman for secondary school administrators in the important issues of educational policy in the United States.

STATEMENT OF THE CASE

The federal government administers aid to handicapped students through the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* (1988) (formerly "Education of the Handicapped Act" or "EHA"). Federal regulations promulgated under IDEA prohibit using a "grant or subgrant to pay for . . . religious worship, instruction, or proselytization," or to pay for "equipment or supplies" that are used for religious worship and instruction. 34 C.F.R. § 76.532(a) (1992).

James Zobrest is a deaf student whose parents enrolled him in the pervasively sectarian Salpointe Catholic High School in 1988. His parents sought to have Catalina Foothills School District provide, through an IDEA grant, a sign language interpreter to assist him in his classes and religious instruction at Salpointe. When the School District refused, the Zobrests brought this suit seeking to require that an interpreter be provided by IDEA funds.

SUMMARY OF THE ARGUMENT

In their haste to reach the intriguing and difficult constitutional questions that could be posed by this case, the parties and the courts below neglected a dispositive issue: 34 C.F.R. § 76.532(a) (1992) prohibits the aid sought by the Petitioners.

The only court that has decided whether this federal regulation prohibits the government from paying for sign language interpreters at parochial schools held that such aid was impermissible. *Goodall v. Stafford County School Bd.*, 930 F.2d 363, 369 (4th Cir. 1991). Because 34 C.F.R. § 76.532(a) provides an independent, adequate, and dispositive basis for affirming the judgment of the Ninth Circuit, there is no need for this Court to reach at this time the constitutional issues urged by Petitioners. In the event that disposition of the case on the basis of the regulation would require resolution of any issue as to the validity of the regulation or its applicability here, the proper course would be to remand the case to the court below for further consideration of such issues.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION SHOULD BE AFFIRMED BECAUSE FEDERAL REGULATION 34 C.F.R. § 76.532(a) PROHIBITS RESPONDENT CATALINA FOOTHILLS SCHOOL DISTRICT FROM PAYING FOR SIGN LANGUAGE INTERPRETATION FOR RELIGIOUS WORSHIP OR INSTRUCTION.

Because this Court "reviews judgments, not opinions," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), its review of the decision below is not limited to the grounds on which the lower courts' decisions rest.¹ Although the courts below did not address the applicability of 34 C.F.R. § 76.532(a),² that regulation effectively disposes of this case. The Ninth Circuit's judgment precluding use of federal grant money to pay for sign language interpretation for religious instruction should, therefore, be affirmed on this independent ground, and the Court need not and should not reach the constitutional issues raised by the parties.

¹ See also *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) ("This Court, however, reviews judgments, not statements in opinions."); *J.E. Riley Inv. Co.*, 311 U.S. 55, 59 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action.").

² Judge Tang's dissent in the Ninth Circuit explicitly refrained from deciding the applicability of the regulation. "I do not address either the applicability or constitutionality in this context of the federal prohibition on the use of EHA funds for religious 'worship, instruction, or proselytization.' 34 C.F.R. § 76.532 (1991)." *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d 1190, 1205 n.2 (9th Cir. 1992) (Tang, J. dissenting).

A. Federal Regulation 34 C.F.R. § 76.532(a) Prohibits States And Subgrantees From Paying For Religious Instruction Or For Equipment Furthering Such Instruction.

For more than twelve years, 34 C.F.R. § 76.532(a) has squarely prohibited use of IDEA (or, formerly, EHA) funds to pay for religious instruction or for equipment used in furtherance of religious instruction. The regulation provides:

§ 76.532 Use of funds for religion prohibited.

(a) No State or subgrantee may use its grant or subgrant to pay for any of the following:

(1) Religious worship, instruction, or proselytization.

(2) Equipment or supplies to be used for any of the activities specified in paragraph (a)(1) of this section

34 C.F.R. § 76.532(a).³ Thus, in relevant part, the regulation prohibits using a "grant or subgrant to pay for . . . religious worship, instruction, or proselytization" or to pay for equipment used for religious worship, instruction, or proselytization. There is no assertion by any party or *amicus* that the regulation was improperly promulgated or that it is otherwise invalid.

There is no dispute that Catalina Foothills School District is a duly authorized "subgrantee" within the meaning of § 76.532(a). There is also no dispute that Salpointe Catholic High School is a "pervasively religious" institution that actively

³ Section 76.532(a) was promulgated on April 3, 1980 as 45 C.F.R. § 100b. In November 1980, upon the creation of the Department of Education, 45 C.F.R. § 100b was recodified as 34 C.F.R. § 76.

engages in religious instruction and worship as a part of its mission. Pet. Br. at 10; *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d at 1192.⁴ Nor is there room for dispute that the sign language interpreter sought by the Zobrests would be used in connection with such religious instruction and worship. See J.A. 90-92. The only question on which application of 34 C.F.R. § 76.532(a) can hinge, therefore, is whether sign language interpretation is either "instruction" or equipment used for instruction within the meaning of the regulation.

⁴

Salpointe High is a private Roman Catholic school, operated by the Carmelite Order of the Catholic Church. Salpointe is a pervasively religious institution; religious themes permeate the classroom. According to the parties' stipulation of facts, '[t]he two functions of secular education and advancement of religious values or beliefs are inextricably intertwined throughout the operations of Salpointe.' Salpointe 'encourages its faculty to assist students in experiencing how the presence of God is manifest in nature, human history, in the struggles for economic and political justice, and other secular areas of the curriculum.' Religion is a required subject for students enrolled at Salpointe, and the students are strongly encouraged to attend the Mass celebrated there each morning. As a result, a sign language interpreter would be called upon to translate religious precepts and beliefs during the course of James's education.

Zobrest v. Catalina Foothills School Dist., 963 F.2d at 1192.

B. Sign Language Interpreters Either Engage In Instruction Or Act As Equipment In Furtherance Of Instruction Within The Meaning Of 34 C.F.R. § 76.532(a).

Regulation 34 C.F.R. § 76.532(a) has been held to prohibit IDEA grantees from paying sign language interpreters at religious schools by the only court that has decided the question. *Goodall v. Stafford County School Bd.*, 930 F.2d 363 (4th Cir.), *cert. denied*, 112 S.Ct. 188 (1991). In a factual setting virtually identical to this case, the Fourth Circuit decided, *inter alia*, that the regulation prohibited the state from paying for a sign language interpreter at a fundamentalist Christian school. "The [payment] of a cued speech interpreter to Fredericksburg Christian School would fall squarely within the regulation's prohibition." *Goodall*, 930 F.2d at 369.

Although the Fourth Circuit did not specify whether the interpreter provided instruction or simply functioned as equipment used for instruction, it held that the regulation applied. The holding could have rested on either clause of the regulation.

Certainly the interpreter would be providing "instruction," even when the content of the instruction originated with others. There can be no doubt that an IDEA grantee would be prohibited from paying a teacher to go to Salpointe High and read religious sermons prepared by the local clergy, even if the teacher read those sermons verbatim. The fact that the publicly paid teacher might accurately repeat the sermon's words – without adding or subtracting anything from the text – would not change the fact that the assembled students would be receiving religious instruction. Thus the Petitioners' suggestion

that the sign language interpreter does not add to or subtract from the teachers' words is simply beside the point. *See, e.g.*, Pet. Br. at 20. The relevant issue is not whether an interpreter – or a hypothetical teacher – is the *originator* of the message being conveyed, but whether the students receive "religious instruction" when a teacher or an interpreter conveys a religious message. Just as a teacher who reads a sermon written by another is providing religious instruction, so is a sign interpreter who translates that same sermon. The regulation lays down a blanket prohibition on IDEA funding of all religious instruction.

Seeking to avoid the charge that they are requesting state-funded religious instruction, the Petitioners attempt to minimize the role of the interpreter. They describe an interpreter as "perform[ing] a mechanical function . . .," Pet. Br. at 20, and assert that "[h]is function is mechanical . . ." *Id.* at 17. The Petitioners' complaint similarly referred to an interpreter as "a neutral conduit, akin to a hearing aid . . ." J.A. at 21.

But in this attempt to minimize the interpreter's role, the Petitioners merely shift attention from the regulation's proscription of "instruction" (§ 76.532(a)(1)) to its prescription of equipment used for such instruction (§ 76.532(a)(2)). In fact, the Petitioners, the Solicitor General, and Judge Tang's dissent below all acknowledge that there is no material difference between a sign language interpreter and the mechanical equipment that would run afoul of § 76.532(a)(2). The Solicitor General, for example, stresses that the interpreter's function is no different from that of other equipment for the hearing impaired. "*At bottom, an interpreter is analytically indistinguishable from other equipment used for the hearing impaired.*" *Id.* at 17.

able from a hearing aid . . ." S.G. Br. at 21 (emphasis added). Judge Tang's dissent below similarly acknowledges that a "sign language interpreter performs a mechanical service," and describes an interpreter as functionally analogous to "eyeglasses," a "hearing aid," a "machine," and "mechanical equipment." *Zobrest v. Catalina Foothills School Dist.*, 963 F.2d at 1201, 1202 (Tang, J. dissenting). Thus there is no dispute that sign language interpreters perform the same function as equipment, as that term is understood in ordinary speech.

The IDEA statute itself provides additional justification for treating interpreters as serving the functional role of equipment. The statute offers a useful, broad, and open-ended catalogue of examples of equipment, including "sensory, and other technological aids and devices . . ." 20 U.S.C. § 1401(5) (1988). The very function of an interpreter is, of course, to provide a sensory aid to the hearing impaired. Therefore, unless "equipment" is read narrowly and without regard to its function in the regulation, § 76.532(a)(2) proscribes the use of sign language interpreters to assist with religious instruction.

In sum, the argument that interpreters do not provide "instruction" because they perform a "mechanical function," but that they are not equipment because they are human, is no more than a semantic shell game. The regulation as a whole prohibits the government from paying for religious instruction or for aids used to further that instruction. Regardless of how one chooses to characterize the interpreter's role, the regulation prohibits the government from paying for the activity.

C. The Solicitor General Fails To Show Any Reason Why § 76.532(a) Does Not Apply.

The Solicitor General, as well as other amici, suggest that § 76.532(a) merely tracks the meaning of the Establishment Clause of the First Amendment. "That regulation does nothing more than implement the Secretary's understanding of the requirements of the Establishment Clause . . ." S.G. Br. at 23.⁵ That assertion is offered, however, without any substantiation. The regulation itself does not state that it is designed merely to incorporate the prohibitions of the Establishment Clause. No evidence is offered that any Secretary of Education ever said that such was the purpose of the regulation. No judicial finding to that effect is or can be invoked.⁶

Nor does the language of the regulation support the assertion that it is mere surplusage. The regulation does not track the language of the Establishment Clause, nor does it refer to that Clause, or to the First Amendment. Surely, if the purpose was for the regulation merely to duplicate the Establishment Clause, this easily could have been made clear.

Instead, the regulation states that IDEA funding may not be used to help provide religious instruction without reference to the specific dictates of the Establishment Clause. The regulation should, accordingly, be applied in this case on

⁵ See also Brief Amicus Curiae of Christian Legal Society *et al.* at 7 n.5. "That regulation, however, is best understood as a regulatory embodiment of the requirements of the Establishment Clause."

⁶ The government cannot, of course, alter the meaning of the regulation in order to gain advantage in litigation. *Bowen v. Georgetown Univ. Hosp.*, 488 U. S. 204, 213 (1988).

its own merits and authority, and with the full respect accorded to a federal regulation duly promulgated by the appropriate agency. *See Atkins v. Rivera*, 477 U.S. 154, 162 (1986); *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

**D. This Court Should Not Reach Out
Unnecessarily To Decide The Constitutional
Issues Raised By The Parties And *Amici*.**

Ignoring the possible applicability of the regulation, the parties and amici are prodding this Court to decide constitutional questions that need not be addressed. It has long been this Court's practice, however, not to decide constitutional issues when there is an adequate non-constitutional legal ground for resolving the dispute before it. The venerable rule is that "[i]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283, 295 (1905). Indeed, it is a "cardinal rule" that courts should "never . . . anticipate a question of constitutional law in advance of the necessity of deciding it." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (quoting *Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). The Court "has rigidly adhered" to the rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it." *Rust v. Sullivan*, 111 S.Ct. 1759, 1789 (O'Connor, J. dissenting) (also quoting *Liverpool*).

Although a question might be raised as to the constitutionality of 34 C.F.R. § 76.532(a), that is not the question upon which the Court granted *certiorari*, nor is it an issue that has

been briefed by the parties. At most, the constitutionality of the regulation is an issue that might be addressed should the Court remand for consideration of issues relative to the regulation. But, at this point this Court should not reach out unnecessarily to decide the constitutional issues that could be raised by this case.⁷

⁷ In the event of a remand, it might be well for the lower court to consider whether there is independent state law that affects the application of IDEA grants. As the court in *Goodall* noted, IDEA and its regulations incorporate, to some extent, state law. 930 F.2d at 365-66. Although the issue was not resolved below, the Ninth Circuit opinion recognized that the Deputy County Attorney and the Arizona Attorney General advised that furnishing an interpreter to Zobrest would violate state constitutional prohibitions. *See Zobrest*, 963 F.2d at 1192. The Arizona Attorney General had in fact advised that "a public school district's provision of an interpreter for a deaf student, who chooses to attend a parochial school, violates . . . art. II, § 12 of the Arizona Constitution." J.A. 9 (emphasis added).

CONCLUSION

Because the applicable federal regulation prohibits use of IDEA funds for religious instruction or related equipment, and because even the Petitioners, the Solicitor General, and other amici have acknowledged that a sign language interpreter acts in the same capacity as equipment for the hearing impaired, the federal regulation controls the outcome of this case. *Amici* National PEARL *et al.* respectfully urge this Court to affirm the judgment of the Ninth Circuit or, in the alternative, to remand for further proceeding in light of the applicable federal regulation.

Respectfully submitted,

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Central Conference of American Rabbis
Committee for Public Education and Religious Liberty
Council for Democratic and Secular Humanism
Michigan Council about Parochial
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